

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**

WASHINGTON, D. C. 20548 *6A000046*

*J. Broeman Proc II*

*8660*

FILE: B-191023

DATE: December 20, 1978

MATTER OF:

Phoenix Power Systems, Inc. *DL600460*

*[Protest of Solicitation Cancellation After Bid Opening]*

DIGEST:

1. Cancellation of <sup>a</sup>solicitation for load bank systems after bid opening is justified when <sup>the</sup> agency determines that <sup>the</sup> specifications are overstated as to weight, size and ventilation requirements and determines that procurement is better suited to <sup>a</sup>two-step formal advertising procedure.
2. "Proprietary" data submitted in response to descriptive literature requirement in IFB which was subsequently canceled, <sup>was</sup> not improperly disclosed to other bidders since <sup>the</sup> data <sup>was</sup> not marked "proprietary" and <sup>the</sup> regulations require that <sup>it</sup> be unrestricted. *the cancellation for Bids (IFB) and*
3. <sup>a</sup> Claim for bid preparation costs is denied where there is no evidence of arbitrary or capricious action toward <sup>the</sup> claimant by <sup>an</sup> agency in canceling <sup>the</sup> IFB. *the data*

Phoenix Power Systems, Inc. (Phoenix) protests the cancellation by the Naval Regional Procurement Office, *AGC00423* Washington Navy Yard (Navy) of IFB N00600-78-B-0696 (IFB 0696) for two 10,000 K.W. load bank systems. The systems are to be used for testing shipboard alternators for nuclear powered aircraft carriers.

IFB 0696 is the second attempt to solicit these requirements. The record indicates that the initial attempt, IFB N00600-77-B-1639, was canceled after opening because the specifications were considered ambiguous or vague. IFB 0696 contained revised specifications and included a requirement for descriptive literature. On the December 29 opening date, five bids were received. The only bid which was considered responsive to the descriptive literature requirements of the IFB was that submitted by Phoenix.

~~0-02920~~

*Dec.*

Two of the firms whose bids were rejected protested to our Office. In reviewing the technical questions raised by the protests (both of which have since been withdrawn) Navy technical personnel concluded that parts of the specification were inadequate. Consequently, by letter dated March 31, 1978, the Naval technical activity recommended that the solicitation be canceled "due to the technical questions raised by several bidders, such questions being the result of complicated data obtained by use of computer programs not previously available to the Government." Further the letter states that the systems to be supplied are "one-of-a-kind" items and "the design should be developmental in nature and not the result of definitive requirements by the Government." The letter concludes by recommending that the requirement be resolicited as a two-step formally advertised procurement. Notice of the cancellation was sent to all bidders on April 6.

Phoenix protested, contending that the agency had no compelling reason to cancel the solicitation and complaining that other bidders were able to inspect its "proprietary" design information submitted with its bid. In this regard, Phoenix notes that none of the other four bidders submitted all of the information required by the descriptive literature clause and argues that because of the cancellation the other bidders will benefit from the Phoenix design information on the resolicitation.

In its report submitted in connection with the protest, the Navy offered a more detailed explanation for its action. It reports that the specification requirements regarding weight and size of the load bank systems could not be met and the requirement regarding the method of ventilation could be improved. In this regard, the agency notes that in the resolicitation the weight restriction has been increased from 25,000 to 30,000 pounds. It also reports that the requirements that each system be a maximum length of 20 feet and that air pass through the entire unit for cooling have been deleted.

The Navy also reports that it made a second review of Phoenix's data in view of the other bidders' protest

allegations and now the agency questions the accuracy of Phoenix's estimate on system weight and notes that the Phoenix data regarding the cooling of resistors is not consistent with previously conducted Navy tests.

Phoenix maintains that the agency has yet to demonstrate that a compelling reason exists to cancel the solicitation. In this regard, Phoenix argues that the specification as set forth in the solicitation can be met and contends that the Navy is unable to produce the "computer data" it claims to have relied on in making its determination to cancel. Further, Phoenix states that its literature indicates that it met the requirements for weight, size and cooling, and notes that the Navy considered its bid responsive.

Our Office has long recognized that the authority vested in a contracting agency to cancel a solicitation and resolicit is extremely broad and in the absence of bad faith or an abuse of discretion, a decision to cancel a solicitation will not be disturbed. Byron Motion Pictures Incorporated, B-190186, April 20, 1978, 78-1 CPD 308. However, in order to protect the integrity of the competitive bidding system, Defense Acquisition Regulation (DAR) § 2-401.1 (1976 ed.) requires that there exist a compelling reason to cancel a solicitation after all bids have been opened and bid prices exposed. We have held that overstatement of the Government's minimum needs is a proper ground for cancellation of a solicitation. Halifax Engineering, Incorporated, B-190405, March 7, 1978, 78-1 CPD 178.

In this instance, the agency seeks to resolicit the requirement using significantly relaxed requirements and a new procurement method. Phoenix maintains that the original specification was adequate and has been able to make convincing arguments that its bid under the canceled IFB may have been responsive. Phoenix also has shown that the Navy was not in possession of any "computer programs." It may be, as Phoenix maintains, that the Navy cannot show that the specification requirements were impossible to meet. However, in view of the fact that of the five bids received only one,

at the most, was responsive and considering the questions raised regarding the weight, size and cooling requirements it appears that the Navy had a reasonable basis to conclude that its minimum needs were overstated and thus to alter the specification and substitute the two-step advertising method of procurement. The fact that Phoenix's bid may have been responsive to the canceled IFB does not indicate that the specification contained therein can actually be met. Nor does the fact that the Navy may have based its determination to cancel, to a certain degree, on information from a protesting bidder make that determination erroneous.

In view of the above and considering that only one of five bidders was able to submit a responsive bid under the subject solicitation, we do not believe the agency abused its discretion by canceling the IFB and resoliciting the procurement.

Regarding the disclosure of Phoenix's "proprietary" literature submitted with its bid, the record does not indicate that the protester's data was so marked. Nor is there any evidence that Phoenix made an attempt to restrict any of its literature. In any event, since this was an advertised procurement, DAR § 2-404.4 (1976) would have required the rejection of Phoenix's bid if its restriction of the literature submitted prohibited the disclosure of sufficient information to permit the other bidders to know the essential nature and type of product offered. It is unfortunate that this data was exposed and the solicitation canceled. However, we do not believe that the agency acted improperly.

Phoenix claims that it is entitled to bid preparation costs because of the Navy's cancellation of the subject solicitation. Our Office has allowed recovery of bid or proposal preparation costs where the Government acted arbitrarily or capriciously with respect to a claimant's bid or proposal. What-Mac Contractors, Inc., B-190241, March 3, 1978, 78-1 CPD 164. As indicated above, we have examined the record in this case and we have found no evidence that the Navy acted arbitrarily or capriciously toward Phoenix.

Accordingly, the protest and the claim for bid preparation costs are denied.

  
Deputy Comptroller General  
of the United States